2010 WL 4077536 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,
v.
Charles FACKELMAN, Defendant-Appellant.

No. 139856.
September 30, 2010.

Court of Appeals No. 284512 Circuit Court No. 07-36291

People-Appellee's Brief on Appeal Proof of Service

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***i TABLE OF CONTENTS**

Index of Authorities ..... ii-
Judgment appealed from and relief sought 1
Statement of question presented 2
Statement of material proceedings and facts 3
Argument 18
I. Medical records prepared by a treating physician, including the patient's statements contained therein, do not violate the Confrontation Clause: by law, neither medical records or a defendant's statements are considered to be prepared “for the purpose of establishing or proving some fact at trial,” and thus are not “testimonial.” Here, Defendant checked himself into a psychiatric hospital after committing the crimes, and made statements to his psychiatrist that were inconsistent with insanity defense. It was not plain error to admit the medical records, or Defendant's statements therein, as impeachment 18
Appellate Standard of Review 18
Discussion 18
Crawford v Washington 19
The Confrontation Clause does not apply to non-testimonial hearsay 21
The Confrontation Clause does not apply to nonhearsay statements 24
Applying *Crawford* 25
Summary 30
Relief 33

***ii INDEX OF AUTHORITIES**

FEDERAL CASES

Barrett v Acevedo, 169 F3d 1157, 1163 (CA 8, 1999) 29
Crawford v Washington, 541 US 36, 68, 124 S Ct 1354, 158 L Ed.2d 177 (2004) 1, 19, 20, 21, 24, 27
Davis v Washington, 547 US 813, 821, 126 S Ct 2266, 165 L Ed.2d 224 (2006) 22, 23
Melendez-Diaz v Massachusetts, —— US ——, ——, 129 S Ct 2527, 2532, 174 L Ed 2d 314 (2009) ..... US ——, ——, 129 S Ct 2527, 2532, 174 L Ed 2d 314 (2009) 20, 21, 27
People v Cooper, 148 Cal App 4th 731, 743-747 (2007) 23, 25
Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984) 1

Tennessee v Street, 471 US 409, 414, 105 S Ct 2078, 85 L Ed.2d 425 (1985)	24
United States v Pugh, 273 F Appx 449, 454 (6th Cir 2008)	22
STATE CASES	
Merrow v Bofferding, 458 Mich 617, 626-627 (1998)	28
People v Carines, 460 Mich 750 (1999)	18
People v Fackelman 486 Mich 907, 907(2010)	1, 17
People v Gist, 188 Mich App 610, 613 (1991)	30
***iii** People v Jones, 468 Mich 345, 355 (2003)	31
People v McPherson, 263 Mich App 124 (2004)	24
People v Spangler, 285 Mich App. 136 (2009)	23
MISCELLANEOUS	
Const 1963, art 1, § 20	19
MRE 703	28
MRE 801(d)(1)	28
MRE 803 (4)	26, 28
MRE 803 (6)	27, 28

*1 JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On January 30, 2008, a jury found Defendant guilty but mentally ill of home invasion first degree, felonious assault, and felony firearm. [1] The trial court sentenced him to a term of incarceration of 45 months to 240 months for home invasion, 12 months to 48 months for felonious assault, and two years of the weapon offense. [2]

Defendant applied to this Court for leave from the August 27, 2009 decision of the Court of Appeals affirming his conviction. [3] Defendant argues the prosecutor's use of statements contained in his psychiatrist's report constituted plain error in violation of *Crawford v Washington* [4] and that trial counsel was ineffective for failing to object. [5]

On April 30, 2010, this Court granted Defendant's application for leave to appeal and directed the parties to file supplemental briefs discussing the following issues:

(1) whether the content of the psychiatric evaluation report of Dr. Shahid as referenced by expert witnesses at trial was testimonial in nature, within the rule of *Crawford v Washington*, 541 US 36,124 SCt 1354, 158 LEd.2d 177(2004); (2) whether the introduction of Dr. Shahid's opinion regarding the defendant's mental state constituted impermissible hearsay; and (3) if the answer to either question (1) or (2) is in the affirmative, whether either error was harmless. [6]

*2 STATEMENT OF QUESTION PRESENTED

Medical records prepared by a treating physician, including the patient's statements contained therein, do not violate the Confrontation Clause: by law, neither medical records or a defendant's statements are considered to be prepared "for the purpose of establishing or proving some fact at trial," and thus are not "testimonial." Here, Defendant checked himself into a psychiatric hospital after committing the crimes, and made statements to his psychiatrist that were inconsistent with insanity defense. Was it plain error to admit the medical records, or Defendant's statements therein, as impeachment?

The Court of Appeals answered: NO
The People answer: NO

Defendant answers: YES

***3 STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

Defendant, Charles Fackelman, was charged with home invasion first degree, felonious assault, and felony firearm,

Randy Krell, along with the driver of another car, was charged criminally for an accident that resulted in the death of Defendant's teenage son, Charlie.[7] On March 28, 2007, while Krell was free on bond awaiting trial, Defendant drove to Krell's house in Lambertville, Michigan. Krell testified that it was approximately 4:45 p.m., and he was looking out the front window of his house, waiting for a friend. When he saw a car at the end of his driveway, he thought it was his friend, so he walked outside and approached the driver's side door.[8] The driver's door opened and Krell recognized Defendant from court.[9] Krell testified that, on one occasion, Defendant had lunged at him and had to be restrained by the sheriff, and, on another occasion, Defendant approached him with clenched fists.[10]

Defendant got out of the car, holding a semi-automatic handgun. He took a loaded clip from his pocket and inserted it into the weapon. Defendant pointed the gun at Krell's chest and said, “we're gonna talk.” Krell started backing away from Defendant with his hands raised in the air. Defendant directed Krell to keep walking and said, “we're gonna talk and end this all in about a minute.”[11] As Krell walked, he heard Defendant pull the slide of the automatic weapon and racked ***4** a bullet into the chamber. Instead of continuing toward his backyard, Krell changed direction and started walking toward the street. He told Defendant that they could talk, but he wanted to stay in front of the house, where there were witnesses. Defendant relied, “No, stop right there, I'll drop you where you are.”[12] Krell ran across the street and into the home of his neighbor, Tom Williams. He quickly closed and bolted the door behind him, and yelled for Williams to call 9-1-1: “there was a man with a gun after me!” Krell proceeded into the kitchen and toward the back of the house.[13] From the back room, he heard Defendant smash through the front door. Then, he heard Defendant talk to Williams and Williams ask Defendant to put the gun away. Defendant responded, “I'm not here for you, I don't want you, I want him.” Williams told Defendant that guns made him nervous and asked him to put it away and he would help him. Krell left the house through the back door and went to another neighbor's house where he called 9-1-1. When he walked back toward his house moments later, he saw Defendant enter his car and drive away.[14] Krell testified that Defendant showed no difficulty talking or walking, and never appeared to be in less than full control of himself.[15]

The prosecutor introduced a video tape captured from Krell's home security camera. The video showed Defendant's car enter Krell's driveway and Krell waving and approaching the car. ***5** The video then showed Defendant open his door, Krell backing-up, and Defendant following him until both men walked outside the camera view.[16]

Thomas Williams testified that he was taking his garage cans to the curb when he noticed a car that he did not recognize parked in front of Krell's house.[17] As Williams walked toward the car, it started moving slowly down the street. Then Krell came out of his house and waved at the person in the car. Thinking that everything was alright, Williams went back inside.[18] A short time later, Williams heard his front door open and slam shut. Krell yelled, “call 9-1-1, he has a gun!” Williams picked up the kitchen phone and called 9-1-1. While he was on the phone, he heard a loud kicking-sound and a crash, as the entire doorframe of his front door came flying onto the floor and Defendant entered his house.[19] Defendant pointed a gun at Williams.[20] Williams told Defendant that he had not invited him inside and asked him to leave. Defendant asked, “Where is he?” and pushed the telephone out of Williams's hand and onto the floor.[21] Williams, who had heard the back door close, told Defendant that Krell was no longer in his house.[22] But Defendant did not leave. Instead, he motioned with the gun for Williams to go into the den. Defendant then proceeded to the laundry room, through the bedroom, and back into the den. While Defendant was in another room, Williams ***6** moved toward the front door, but Defendant cut him off. Williams asked Defendant to leave and told him that guns made him uncomfortable. Defendant ratcheted the top of the gun back, removed one bullet, held it out in his hand to show Williams, and asked, “Do you feel better now?” Williams told Defendant that he did not and asked him to leave his

house. Defendant walked to the front door, stopped and looked around at the entire doorframe that was laying on the floor. Before walking out of the house, he said, “I'm sorry, I will pay for this.” [23]

Williams testified that Defendant never exhibited any slurred speech and spoke in a quiet and clear voice. He had no problems moving around the house and walked away from the house in a steady line. [24] Defendant appeared to be in full control of his actions during the entire time he was in the house. Williams described Defendant as quiet and intent on what he was doing. [25]

After leaving Williams's house, Defendant drove to his mother's house in Toledo, Ohio. He hid the gun in the heat register and called his brother and instructed him to get rid of it. [26] Later that evening, Defendant's mother and brother took the gun to a quarry and his brother disposed of it. [27]

Al Beale, a friend of Defendant, helped the family find him after learning that Defendant had gone after Krell with a gun. [28] Beale found Defendant at a gas station and contacted attorney Kim Kuhn, who arranged for Defendant's admission to Flower Hospital for psychiatric help. As Beale ***7** drove Defendant around waiting for Kuhn to finalize the arrangements with the hospital, the Sylvania Township Police pulled their car over and arrested Defendant. [29]

Deputy Timothy George of the Monroe County Sheriff's Department testified that they arrested Defendant in Sylvania, Ohio on March 28th, while Defendant was in route to Flower Hospital. Deputy George turned Defendant over to the Sylvania Police who searched him and recovered two live rounds, stamped 380 auto for a 38 pistol. They turned the evidence over to Deputy George, who placed it into evidence. [30] Defendant was admitted to Flower Hospital that same night. [31]

Dr. Zubin Mistry, a clinical psychologist, met with Defendant at his office on two occasions in order to make a clinical assessment regarding legal insanity. In preparation for the assessment, Dr. Mistry reviewed medical records from other practitioners who treated Defendant, as well as hospital records and counseling notes. [32] Dr. Mistry testified that it was important to review the observation and diagnostics of other practitioners in formulating his own opinion. [33] In particular, he reviewed Dr. Shahid's records from Flower Hospital including the “assessments and evaluations that were completed by Dr. Shahid.” [34] Dr. Mistry testified that he interviewed Defendant's wife, Tim ***8** Churchill, Kimberly Kuhn, and others familiar with Defendant before and during the time of the offense for signs of psychotic behavior, such as rocking or “trance-like” states. [35]

Dr. Mistry testified that he first met with Defendant on September 4, 2007. He described Defendant as a “little bit unkempf” and “out of it.” He was surprised that Defendant did not have a higher level of functioning considering that it had been more than a year since his son's death. Dr. Mistry testified that Defendant had a lethargic appearance and demonstrated the classical signs of severe depression. After taking some background information from Defendant, Dr. Mistry made another appointment with Defendant. [36] When Dr. Mistry saw Defendant again on September 13, 2007, Defendant had placed new batteries in his hearing aid, which had not worked well in the first visit, and he appeared more alert and focused. [37]

Dr. Mistry testified that there was no question that Defendant was suffering from a mental disorder of depression. He pointed to Defendant's slowness, slurred speech, his affect, appearance, inability to attend to his hygiene, reports of rocking in a dark room, plans of suicide, inability to handle activities during the day, and his withdrawn behavior to family. [38] Dr. Mistry noted that, according to Defendant's records, other practitioners had made the same diagnosis of “severe depression” and “psychogenic fugue,” which Dr. Mistry defined as a “[l]oss of memory or awareness.” [39] He concluded that, while there were no signs of delusion or hallucination present ***9** during their interviews, all other indications were that Defendant was suffering from a mental illness of severe depression at a profound level that impaired him substantially and indicated that psychosis was also present. He concluded that Defendant's illness caused him not to be able to maintain touch with reality and that he was legally insane under the statute. [40]

On cross-examination, Dr. Mistry testified that Defendant suffered a "major depressive episode with psychotic features." His opinion that Defendant suffered from psychosis was, in part, based on the presence of "dissociative fugue," [41] which was, in turn, evidenced by Defendant's complete loss of memory of the event. [42] Dr. Mistry concluded that Defendant was being truthful about his lack of memory. [43]

The prosecutor questioned Dr. Mistry regarding statements attributed to Defendant that appeared in Dr. Shahid's psychiatric evaluation, two days following the offense. Specifically, the prosecutor asked Dr. Mistry if he was aware of Defendant's statement that "he went to the person who he believes was responsible for his son's death and, quote: I wanted him to feel my pain," [44] and Defendant's statement that he remembered "stopping his car and seeing that person who the patient believes was responsible for his son's death, and stated that that person took off in the street and, quote: I followed him across the street." [45] Dr. Mistry testified that he was familiar those statements ***10** but explained that a person can "slip in and out of [a state of psychosis] at various time frames," [46] He reiterated his position that there was no indication that Defendant was being untruthful to him about his lack of memory. [47]

Dr. Mistry also testified that he disagreed that Defendant's actions in hiding the gun in the heat register of his mother's house meant that his behavior was based on any sense of reality. He explained that people suffering from psychosis behave unpredictably. [48] Dr. Mistry agreed that it was normal behavior for someone to be angry at the person whom they believe caused a bad situation for them, but explained that a person suffering from psychosis can vacillate. [49]

The prosecutor asked Dr. Mistry whether he could point to any part of Dr. Shahid's report where he believed that Dr. Shahid was wrong in concluding Defendant suffered from major depression, "single episode . . . severe, without psychosis." Dr. Mistry testified that he disagreed with Dr. Shahid's diagnosis regarding the presence of psychosis and did not think that Dr. Shahid's assessment of Defendant was "extensive enough." [50]

Defendant testified about his son's death and the psychological impact that it had on his life. He sought grief counseling and was placed on medication because he was suffering from anxiety, tremors, and emotional outbursts. [51] Defendant testified that he was very angry with Krell and felt ***11** that Krell was insulting and antagonizing him and his family. [52] He recalled that he had one of these "outburst" in court when he stood in front of Krell, looking "menacing," as Krell was attempting to leave the court room. Defendant explained that his emotion had been "building up," but denied that his behavior was intentional. He claimed that the courtroom was small and Krell had to walk past him to leave. [53] Defendant also recounted a "confrontation" in court. He said that when Krell walked past him, he drew his clinched fist back at Krell, but was stopped by his wife. [54] Defendant denied that he ever thought about using a gun against Krell. [55]

Defendant testified that he did not dispute any of the testimony provided by Krell or Williams regarding his actions on March 28, 2007, but said that he had no memory of going to Krell's house on March 28, 2007. [56] He remembered was going to the high school's first baseball game of the season because it would have been his son's first game of the year. He tried to avoid people and waved them away when they approached him. He went home and locked himself in his room. Defendant testified that, the next day, he went to work. The last thing he remembered was going out to his car at lunch time and crying. After that point, his mind was blank. The next thing he remembered was being on a red couch in the waiting room of the rescue crisis center. [57] Defendant ***12** testified that he did not recall talking to Dr. Shahid on the day after the incident and did not remember making the statements attributed to him in Dr. Shahid's report. [58]

Defendant testified that the driver of the car in which his son was a passenger during the accident was his son's friend. That person had gone to Defendant's house, apologized, and plead guilty to the crime. But Krell went to trial and never apologized

for what he did. Defendant testified that he eventually became so angry with Krell that he wanted "to see him live in a cardboard box the rest of his life." He explained that he was suing Krell and wanted to make his life difficult. He testified that he wanted Krell to suffer and admitted that, months before the incident, he had thought about physically harming him. [59]

Defendant testified that the gun that he took with him to Krell's house was one of the guns he had at home, but he claimed that he had no memory of removing the gun from his home and taking it with him. He insisted that he did not take the gun to work because it was illegal to have a firearm on government property. Defendant assumed that he must have gone home to get the gun at lunch time. [60]

Defendant testified that he never knew exactly where Krell lived so he did not know how he ended up in front of his house. [61] Defendant also did not remember hiding the gun or going to his mother's house. [62]

***13** Defendant testified that he started drinking after his son's death. He drank whisky and, on the day of the incident, had margarita mix in the car with him at lunchtime and drank alcohol then. He testified that he was not intoxicated, but was probably over the limit. [63]

The prosecutor called Dr. Jennifer Balay, of the Center for Forensic Psychiatry, to testify in rebuttal to Defendant's insanity defense. Dr. Balay assessed Defendant for criminal responsibility on May 16, 2007. She based her opinion on her interview with Defendant and from reviewing the hospital records of Flower Hospital, including the notes and diagnosis of the treating physician. [64] She testified that Defendant had been significantly depressed for some period of time and, in her clinical judgment, he had a substantial disorder of mood which was significantly interfering with his functioning. Therefore, Defendant met the statutory definition of mentally ill, based on his depression alone. [65]

Dr. Balay explained that psychosis is an extremely disturbed state of mind and occurs when a person loses touch with reality. Signs of psychosis include delusional or psychotic ideasm, such as hearing voices or believing that things were true that were not true. While she agreed that psychosis can occur in conjunction with depression, Dr. Balay testified that Defendant never exhibited any behavior that suggested that he ever lost touch with reality either in his interview with her or his interview with Dr. Shahid. [66] Dr. Balay testified that a lack of memory is different than being psychotic and does not mean that someone suffers from a psychosis. While a person who is ***14** psychotic may have trouble remembering something that occurred during a state of disorientation and confusion, loss of memory does not mean someone is psychotic. [67]

Balay testified that during her interview with Defendant, he initially stated that he remembered absolutely nothing about the entire day, but then reluctantly agreed that he remembered going to work. [68] Dr. Balay testified that, considering Defendant's statements to Dr. Shahid, she did not believe Defendant's claim regarding his loss of memory. Specifically, Dr. Balay pointed to Defendant's statements in the report where he said that he went to the person who he believed was responsible for his son's death and quote, "I wanted him to feel my pain." [69] The report further stated that, "Patient stated that during the legal trial and otherwise, the person who patent believes was responsible for the death of his son has not shown any remorse, and this makes patient very angry," and, "Patient stated that he remembers stopping his car and seeing that person who the patient believes was responsible for his son's death and stated that that person took off in the street and,'I followed him across the street.' " [70]

Dr. Balay testified that, while she agreed with Dr. Mistry that Defendant suffered from a major depression, she did not agree that Defendant was psychotic because he never said anything to her or to the staff at Flower Hospital that could be considered delusional. [71] Rather, Dr. Balay explained, Defendant's conduct showed that he was a man who was distraught over the loss of his ***15** son and could not cope with his grief. Defendant freely admitted his anger for the man that he believed caused his son's death and he was worried that he was not going to see justice done. Accordingly, on the day after he went to what would have been his son's first baseball game of the year, Defendant got drunk and went after the man he held responsible

for that death. [72] Dr. Balay testified that his behavior at the time of the offense was methodical and controlled. It indicated his appreciation for the difference between right and wrong and his ability to conform his conduct. For example, rather than opening fire when he came out of his car, Defendant pointed the gun at Krell and instructed him to move to the backyard. When he entered the neighbor's house after Krell, he did not shoot the neighbor, who Defendant believed was an innocent bystander. Instead, after seeing that his intended victim was not there, Defendant stopped his aggressive behavior right away. Further, the fact that Defendant hid his gun after the crime meant that he understood the wrongfulness of his conduct. [73] Dr. Balay testified that, while Defendant was having a pathological mourning reaction to the loss of his son, he was not legally insane. [74]

The jury found Defendant guilty but mentally ill on all counts. [75] The trial court sentenced him to 45 months to 240 months for home invasion first degree, 12 months to 48 months for the two counts of felonious assault, and two years for the felony firearm.

***16** On November 21, 2008, the Court of Appeals remanded Defendant's case for an evidentiary hearing on his claim of ineffective assistance of counsel. [76]

Ginther Hearing-- February 27, 2009

Asad Farah, Defendant's trial counsel, testified that, prior to trial, he had a copy of Dr. Shahid's report. Defendant's *Ginther* hearing Exhibit 1. [77] He testified that he did not object to the prosecutor's use of the report because the prosecutor was not using the report as substantive evidence but, rather, was attempting to impeach Dr. Mistry's conclusions. He further did not want to object because he knew that would call the jury's attention to the statements contained in Dr. Shahid's report which were harmful to the defense. [78] With regard to the prosecutor's closing argument, Farah testified that the prosecutor again used Dr. Shahid's report to attack Dr. Mistry's opinion-- he did not use the report as substantive evidence for the truth. Accordingly, Farah did not believe that there was a confrontation problem with the prosecutor's closing remarks and did not object. [79]

Farah testified that he did not hear the prosecutor ask any questions which mischaracterized or added details that were not contained in Dr. Shahid's report. [80] Moreover, he did not believe that Defendant's actions at the time of the offense were at issue at trial. Farah beleived that objecting to the prosecutor's argument regarding Dr. Shahid's report would, in effect, highlight the details in the ***17** report to the jury and would be harmful to the defense, Farah testified that he was relying on the jury's ability to consider what was accurate or inaccurate in the prosecutor's argument. [81]

On March 4, 2009, the trial court issued a written order denying Defendant's motion for a new trial. The court ruled that there was no showing of ineffective assistance of counsel because the prosecutor's use of Dr. Shahid's report was for impeachment purposes only and there was no *Crawford* violation. [82]

On August 27, 2009, the Court of Appeals affirmed Defendant's conviction. [83] On April 30, 2010, this Court granted Defendant's application for leave to appeal. [84]

*18 ARGUMENT

I. Medical records prepared by a treating physician, including the patient's statements contained therein, do not violate the Confrontation Clause: by law, neither medical records or a defendant's statements are considered to be prepared "for the purpose of establishing or proving some fact at trial," and thus are not "testimonial." Here, Defendant checked himself into a psychiatric hospital after committing the crimes, and made statements to his

psychiatrist that were inconsistent with insanity defense. It was not plain error to admit the medical records, or Defendant's statements therein, as impeachment.

Appellate Standard of Review

The People accept Defendant's statement that review is for plain error. Where there is a failure to make a contemporaneous objection, review is for plain error: Defendant must show 1) that error occurred, 2) that the error was plain or obvious, and 3) that it affected his substantial rights 4) to a degree that a miscarriage of justice resulted. A miscarriage of justice results if an innocent person was likely convicted, or if the error was one that, if countenanced, would seriously affect the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [85]

Discussion

Defendant argues that the prosecutor violated his right of confrontation by using statements he made to his psychiatrist during his hospitalization which were included in the psychiatrist's evaluation. But since neither these statements or the psychiatrist's report were testimonial, the Confrontation Clause is not implicated at all and need not be considered.

19 *Crawford v Washington

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...." U.S. Const., Am. VI. The Michigan Constitution similarly provides: "In every criminal prosecution, the accused shall have the right... to be confronted with the witnesses against him...." [86]

In *Crawford v Washington*, [87] the Supreme Court concluded that under a proper understanding of the Confrontation Clause, "testimonial statements" of witnesses absent from trial are admissible only where the declarant is unavailable and where the defendant has had a prior opportunity to crossexamine. [88] What, then, is a testimonial statement? While the *Crawford* Court expressly "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,' " [89] it stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the **abuses** at which the Confrontation Clause was directed." [90] The Court provided some guidance to possible "formulations of th[e] core class of'testimonial' statements": 1) Ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; 2) extrajudicial statements contained ***20** in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and 3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. [91]

In *Melendez-Diaz v Massachusetts*, [92] the Supreme Court applied *Crawford* and the Confrontation Clause and concluded that "certificates of analysis" in which nontestifying laboratory analysts stated, under oath, that the substances seized by the police and tested by the analysts were cocaine, were testimonial statements because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." The Supreme Court concluded that although labeled "certificates" under Massachusetts law, the documents were "quite plainly affidavits" and were "incontrovertibly a'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " [93] The certificates were, thus, "functionally identical to live, in-court testimony, doing'precisely what a witness does on direct examination.' " [94] Not only were the affidavits "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," but, under Massachusetts law, the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance. [95]

Thus, the Supreme Court ***21** held that the "analysts' affidavits were testimonial statements, and the analysts were'witnesses' for purposes of the Sixth Amendment." [96] Reiterating that the primary protection of the confrontation clause is to guarantee that a defendant may confront witnesses who "bear testimony" against him, the Supreme Court held that "[t]here is little doubt that the documents at issue in this case fall within the "core class of testimonial statements." [97]

The Confrontation Clause does not apply to non-testimonial hearsay.

Pivotal to the Melendez-Diaz decision, therefore, was that the nontestifying analyst generated their reports for trial use: thus, for all intents and purposes, they were "witnesses" and their reports were "testimony." But conversely, "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because-having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial-they are not testimonial." [98] Statement that are not made under circumstances which would lead an objective witness reasonably to believe it would be available for use at a later trial are not testimonial. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." [99]

***22** "Only [testimonial] statements ... cause the declarant to be a'witness' within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay ...". [100] In *Davis v Washington*, [101] the trial court admitted into evidence a recording of the statements made by a domestic violence victim in response to a 911 telephone operator's questions regarding what had occurred during the incident that was the subject of the call, including the identity of the perpetrator, what he was doing, why he was at the house, whether he was armed, and a description of the assault. [102] Applying *Crawford*, the Supreme Court held that, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." [103] Thus, interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are clearly testimonial, "whether reduced to writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer." [104]

***23** Accordingly, statements made to a physician, whose primary purpose was to assess the patient's mental and physical condition and deal with her potentially critical need for assistance and protection-- and not primarily to establish a past crime by the defendant-- are not testimonial. [105] In *People v Cooper*, the California appellate court ruled that the circumstances before it objectively indicated that the expert's primary purpose was to assess the victim's mental and physical condition and deal with her potentially critical need for assistance and protection. [106] Thus, when the victim made statements to the expert, she was not acting as a witness or as an accuser and the statements were not testimonial. [107] Citing *Davis*, the *Cooper* Court concluded that whether an individual is acting as a "witness" and, in essence, "testifying" so as to trigger protection under the Confrontation Clause depends on the circumstances surround the statement, "including, (1) when the statements were made (proximity to the events), (2) the nature of the report given, (3) the level of formality when the statements were made, and (4) the purpose of obtaining the statements." [108]

24** ***The Confrontation Clause does not apply to nonhearsay statements.

Protection under the Confrontation Clause applies only to statements used as substantive evidence. Therefore, even if testimonial, the *Crawford* Court specifically noted that the Confrontation Clause does not bar those statements for purposes other than establishing the truth of the matter asserted. [109] In *Tennessee v Street*, [110] cited in *Crawford*, the prosecution introduced a

co-defendant's written statement to rebut the defendant's claim that the police coerced his confession. Street contended that, prior to his confession, the police read the co-defendant's statement to him, then forced Street to parrot the details of that statement in his own confession. [111] In order to rebut the defense theory, the prosecutor introduced the co-defendant's written statement to demonstrate how it differed in significant details from the Street confession. [112] The Supreme Court distinguished between the use of hearsay evidence as substantive evidence against a criminal defendant and the use of such evidence for a non-hearsay purpose, such as rebuttal or impeachment. It held that the latter use "raises no Confrontation Clause concerns" because the co-defendant's confession had not been introduced to prove the circumstances of the murder, but instead had been introduced to rebut the defendant's claim that his confession had been coerced. This non-hearsay use, the Court held, was consistent with the Confrontation Clause. [113]

***25** In *People v Cooper*, the California court held that"[h]earsay relied upon by experts in formulating their opinions is not testimonial because it is not offered for the truth of the facts stated but merely as the basis for the expert's opinion." [114] The hearsay relied upon by an expert in forming his or her opinion is "examined to assess the weight of the expert's opinion," not the validity of their contents. Therefore, to the extent that the expert's opinion regarding the victim's mental competence was based on the testimonial statements, the confrontation clause did not prevent her from rendering her opinion and stating the sources of information on which she relied in reaching it. [115]

Applying Crawford

Though the Court of Appeals agreed that the use of Dr. Shahid's report for impeachment of Defendant's expert, Dr. Mistry, was proper ("to the extent that it used Dr. Shahid's report to impeach Dr. Mistry, the evidence did not constitute inadmissible testimonial hearsay."), [116] it held that the prosecution's use of Dr. Shahid's report in direct examination of its own expert, Dr. Balay, constituted a "testimonial" use:

because, like a statement taken by a police officer during a custodial interrogation, the statements attributed to defendant by Dr. Shahid appear to be responses to questions posed by Dr. Shahid for purposes of defendant's psychiatric examination. In other words, like a statement taken by a police officer, Dr. Shahid's report appears to consist of defendant's responses to Dr. Shahid's questions, which were then recorded by Dr. Shahid. . . [the prosecutor] used the quotations from Dr. Shahid's report as substantive evidence to prove the truth of the matter asserted. The prosecution used the quotations from Dr. Shahid's report to prove that defendant did, in fact, recall events relating to the March 28, 2007, incident, which was the matter ***26** asserted by the prosecution, and supported on direct examination by the prosecution's expert witness, Dr. Balay. See MRE 801(c); MRE 802.

The court appears to have held that Defendant's own statements--"the statements attributed to defendant by Dr. Shahid," which were "responses to questions posed by Dr. Shahid for purposes of defendant's psychiatric examination"-- are testimonial, so that Defendant was denied the ability to cross-examine *himself*. But this makes no sense-- when Defendant made his statements to Dr. Shahid, he was not acting as a witness against himself. The question before this Court is whether the document *reporting* those statement is testimonial; that is, whether Defendant was denied confrontation because Dr. Shahid was not called. He was not.

Dr. Agha Shahid's March 29, 2007 report and Defendant's statements contained therein were not testimonial under *Crawford*. Defendant was admitted to Flower Hospital under a voluntary commitment-- not ordered by any court-- for psychiatric treatment. As a psychiatrist for the hospital, Dr. Agha Shahid conducted a psychiatric examination and generated his March 29, 2007 evaluation of Defendant for the sole purpose of diagnosing his mental condition and providing him with treatment. As *Defendant's* doctor, Dr. Shahid was not an agent of law enforcement, and Defendant's statements to him, contained in the evaluation, were made for purposes of diagnosis and treatment. Thus, those statements were admissible under MRE 803(4) [117] and Dr. Shahid's report ***27** would have been admissible as a business record. [118] Even the Court of Appeals noted that the questions and answers "were for purposes of defendant's psychiatric examination," which was accomplished by a private physician under no court order. That business records are not testimonial because they are not made under circumstances

which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial is well-established; *Crawford* itself so notes. [119] Referring to exceptions in existence at the time the Confrontation Clause was adopted, the Court observed that "Most of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy." [120] Business records, "having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial "are not testimonial." [121] The problem in *Melendez-Diaz*, of course, was that the lab reports were prepared for purposes of litigation. Not so with Dr. Shahid's medical records of Defendant.

Here, *Defendant's* expert testified that, in preparation for his assessment, he reviewed Defendant's medical history, especially the assessments and evaluations that were completed by Dr. ***28** Shahid. Under MRE 703, as the panel noted, the Michigan rule requires that the facts upon which the expert relies in reaching an opinion be in evidence. [122] *Defense counsel*, then, should have placed Dr. Shahid's report in evidence under the terms of Rule 703. The statements of Defendant to Dr. Shahid are both party admissions, [123] as well as statements made for the purposes of medical treatment or diagnosis, [124] and Dr. Shahid's diagnosis was admissible as a business record. [125] Their *substantive* use would have been permissible--but they were *not* used substantively by the prosecution.

The overarching principle here is that Dr. Shahid's medical records of his examination of Defendant were *not* used substantively in the direct examination of the People's expert. The Court of Appeals reached the contrary conclusion by mis-formulating the definition of hearsay. The court said the use was substantive because "to prove that defendant did, in fact, recall events relating to the March 28, 2007, incident, which was *the matter asserted by the prosecution*, and supported on direct examination by the prosecution's expert witness, Dr. Balay." [126] But that a statement is offered to support a "matter asserted by the prosecution" does not make it hearsay. Hearsay is a statement "offered to prove the truth of the matter asserted" *by the declarant in the statement*. Defendant's ***29** statements in Dr. Shahib's records were not offered to prove his actions concerning the crime charged, but to show his mental state shortly after it occurred. Those statements were *never* argued as proving the crime, but only as supporting Dr. Balay's diagnosis and impeaching Dr. Mistry's.

In order to decide whether or not to believe an expert's opinion, the jury is instructed consider the reasons and facts upon which the expert based that opinion, and decide if those facts are true. [127] In this case, the prosecutor argued that Dr. Mistry's opinion that Defendant was psychotic was erroneously based on his acceptance, as fact, that Defendant had no memory of the offense. [128] To this end, the prosecutor elicited testimony through Dr. Balay, 1) that a lack of memory has nothing to do with whether a person is legally insane, and 2) that Defendant's inconsistent reporting of his memory could simply mean he was fabricating a loss of memory. Quoting from Dr. Shahid's evaluation, Dr. Balay noted that Defendant gave Dr. Shahid details on the day after the offense, yet when Defendant talked to her and Dr. Mistry, he claimed to have no memory. The prosecutor argued that Dr. Mistry's opinion-- based on Defendant's misrepresentations-- was, in turn, unreliable. [129]

***30** Accordingly, since Defendant's statements to Dr. Shahid were not offered for the truth of the facts stated, but merely as the basis for the expert's opinion, [130] this use does not implicate the Confrontation Clause.

Furthermore, the prosecutor's use of Dr. Shahid's diagnosis was likewise not barred by the Confrontation Clause. Not only did Dr. Mistry testify that he relied on Dr. Shahid's report to form his opinion, thus making the report and the diagnosis contained therein admissible as a business record, but he specifically testified that he relied on Dr. Shahid's *diagnosis*, [131] Thus, the use of that diagnosis was impeachment and not barred.

Summary

• The prosecutor's use of Defendant's statements contained in his medical records, upon which the experts based their opinions, did not violate Defendant's right of confrontation.

Defendant's statements to Dr. Shahid and Dr. Shahid's report evaluating Defendant's mental condition were not testimonial and were properly used on cross and direct examination, as well as in closing argument, to attack the defense claim that Defendant was insane at the time of the offense. [132]

***31** • Since the defense expert based his opinion on the observation and diagnostics of Dr. Shahid, the use of Dr. Shahid's diagnosis to impeach that expert did not constitute hearsay and was not barred by the Confrontation Clause.

Defendant should have placed Dr. Shahid's report in evidence under the terms of Rule 703 and its contents, including Dr. Shadhid's diagnosis would have been admissible as a business record. Moreover, since Dr. Mistry specifically testified that he relied on Dr. Shahid's *diagnosis*, the use of that diagnosis-- offered not for the truth of the matter asserted, but merely to impeach the basis for the expert opinion-- is not barred by the Confrontation Clause.
• Even if the Defendant's statements to Dr. Shahid and Dr. Shahid's opinion were erroneously admitted into evidence, Defendant cannot show that plain error.

The Court of Appeals ruled that while the prosecutor's use of Dr. Shahid's report during the direct examination of Dr. Balay constituted inadmissible testimonial hearsay, Defendant could not show that this error resulted in outcome-determinative prejudice, or "in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings[,]" therefore, defendant is not entitled to relief. [133]

The Court of Appeals reasoned that the ultimate issue at trial was not whether Defendant actually engaged in the conduct that led to his criminal charges but whether his acts should be excused because of legal insanity. The court observed that Dr. Balay's opinion was premised primarily on Defendant's ability to conform his conduct to the requirements of society and appreciate the wrongfulness of his conduct-- facts that were unrelated to the contents of Dr. Shahid's report. The jury could have relied upon these observations-- Defendant directing Krell's movements, ***32** following Krell, breaking down a door to gain access to Krell, and hiding the gun in his mother's house-- to find that Defendant was not suffering a psychosis at the time of the offense.

Accordingly, the Court of Appeals correctly ruled that Defendant could not demonstrate that any error in admitting testimonial hearsay resulted in a miscarriage of justice, or affected the outcome of the case.

*33 RELIEF

WHEREFORE, this Court should affirm Defendant's convictions.

Footnotes

1 13a.
2 13a.
3 43a
4 *Crawford v Washington*, 541 US 36, 68, 124 S Ct 1354, 158 L Ed.2d 177 (2004).
5 *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).
6 *People v Fackelman* 486 Mich 907, 907(2010).
7 1b-3b.
8 1b-3b.
9 3b.

10 3b-4b.
11 5b-7b.
12 7b-8b.
13 8b-9b.
14 10b-12b.
15 12b-13b.
16 13b-26b, 27b-28b.
17 29b-31b.
18 31b.
19 31b-32b.
20 33b.
21 33b-34b.
22 34b-35b.
23 35b-38b.
24 39b.
25 40b.
26 41b-44b.
27 43b-46b, 76b-77b.
28 78b.
29 79b-86b.
30 47b-52b.
31 75a
32 60a-61a.
33 64a-65a.
34 75a-78a.
35 62a-63a.
36 65a-68a.
37 68a, 75a.
38 78a-86a.
39 69a-70a.
40 75a, 78a-86a.
41 97a-101a.
42 100a, 104a-105a.
43 103a.
44 106a.
45 106a-107a.
46 106a-108a.
47 108a, 111a.
48 108a-109a.
49 113a-114a.
50 114a-118a.
51 129a-135a, 53b-54b.
52 54b-55b.
53 53b-54b.
54 67b.
55 67b.
56 136a-140a, 56b.
57 136a-140a.
58 143a, 73b-75b.

59 58-63b.
60 63b-65b.
61 72b-73b.
62 75b.
63 68b-71b.
64 154a-155a.
65 149a-153a.
66 156a-158a.
67 158a-159a.
68 160a-161a.
69 161a.
70 Id.
71 163a-165a.
72 170a-172a.
73 167a-170a.
74 184a.
75 13a.
76 4a.
77 223a-224a.
78 225a-227a.
79 228a-229a.
80 230a-232a.
81 240a-241a.
82 17a
83 43a.
84 *People v Fackelman* 486 Mich 907 (2010).
85 *People v Cannes*, 460 Mich 750 (1999).
86 Const 1963, art 1, § 20.
87 *Crawford v Washington*, 541 US 36.
88 *Crawford*, 541 US at 59.
89 Id, 541 US at 68.
90 Id.
91 Id, 541 US at 51-52 (internal quotations and citations omitted).
92 *Melendez-Diaz v Massachusetts*, — US —, —, 129 S Ct 2527, 2532, 174 L Ed 2d 314 (2009).
93 Id, 129 S Ct at 2532 (quoting *Crawford*, 541 US at 51) (internal quotation marks omitted).
94 Id.
95 Id, quoting *Crawford*, 541 US at 52 (citation and internal quotation marks omitted).
96 Id.
97 Id.
98 *Melendez-Diaz*, supra 129 S Ct at 2539-2540.
99 *Crawford*, 541 US at 68.
100 *Davis v Washington*, 547 US 813, 821, 126 S Ct 2266, 165 L Ed.2d 224 (2006)(citation omitted).
101 Id.
102 ld, 547 US at 817-818.
103 Id, 547 US at 821-822.
104 Id, 547 US at 826. See also *United States v Pugh*, 273 F Appx 449, 454 (6th Cir 2008),
105 *People v Cooper*, 148 Cal App 4th 731, 743-747 (2007).
106 Id, 148 Cal App 4th at 743-744.

107 Id. But where the questioning evolves from determining the need for assistance to obtaining statements aimed at implicating the defendant for **elder abuse**, admission of the responses to those types of questions were precluded by the confrontation clause. Id, 148 Cal App 4th 744.

See also *People v Spangler*, 285 Mich App. 136 (2009), where the Court of Appeals remanded the case to the trial court for an evidentiary hearing to determine if the complainant's statements to a Sexual Assault Nurse Examiner (SANE) during a medical forensic examination were testimonial-- that is-- whether the totality of the circumstances of the victim's statements objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency. Id, at 154-157.

108 148 Cal App 4th at 743, citing *Davis*, supra, 547 US at 826-830.

109 *Crawford*, *supra*, 541 US at 59 n 9, citing *Tennessee v Street*, 471 US 409, 414, 105 S Ct 2078, 85 LEd.2d 425 (1985).

110 *Street* 471 US at 414.

111 *Street*, 471 US at 411.

112 *Street*, 471 US at 411-412.

113 Id, 471 US at 417. See also *People v McPherson*, 263 Mich App 124 (2004).

114 Id, 471 US 747.

115 Id, 48 Cal App 4th at 747 (citation omitted).

116 44a-45a.

117 MRE 803 (4) says that statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment are not excluded by the hearsay rule, even though the declarant is available as a witness.

118 MRE 803 (6) excludes from the hearsay rule "a memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, *opinions, or diagnoses*, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

119 *Crawford*, supra, 541 US at 51-52,56.

120 Id.

121 *Melendez-Diaz*, supra 129 S Ct at 2539-2540.

122 MRE 703 states that the facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

123 MRE 801(d)(1).

124 MRE 803(4).

125 MRE 803 (6); *Merrow v Bofferding*, 458 Mich 617, 626-627 (1998). Where the medical records contain a contested hearsay statement, that statement must also be admissible under a hearsay exception unless it qualifies as nonhearsay. Id, at 627. Defendant's statements to Dr. Shahid in this case, are admissions, and thus, not hearsay.

126 45a (emphasis added).

127 Accordingly, the jury instructions "Expert are allowed to give their opinions in court about matters which they are experts on. However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert's opinion, think carefully about the reasons and facts that he or she gave for his or her opinion and whether those facts are true." 87b.

128 It is well established that "[T]his type of evidence is never admitted for the truth of the matter asserted, but simply to show a basis for an expert's opinion.... 'the evidence is not offered, nor admissible, for the fact of the matter therein asserted, but simply to indicate the information and material relied upon by the expert' " *Barrett v Acevedo*, 169 F3d 1157, 1163 (CA 8, 1999).

129 198a-200a. The prosecutor argued: "So it's real important to look at what Dr. Shahid had to say, even though he didn't testify here before you. *But his conclusions in that report were integral, or part of, or very important in the conclusions that were reached later by both Dr. Mistry and Dr. Balay.*" 190a (emphasis added).

"But in order for you to take that [Dr. Mistry's] opinion and base your decision on it, you ought to think about what underlies that opinion, whether there's any good reason for that opinion. And I submit to you form what you've heard from Dr. Mistry, from what

you've heard from Dr. Balay, and the references you've heard to Dr. Shahid's report, there aren't any real reasons behind Dr. Mistry's conclusion that the Defendant was suffering from a psychosis, not any real reason at all." 192a.

130 Id, 471 US 747.

131 75a-78a.

132 Since the law does not fault counsel for choosing not to pursue meritless or futile objections, Defendant's claim that trial counsel was ineffective for not objecting to this line of questioning is meritless. *People v Gist*, 188 Mich App 610, 613 (1991).

133 *eople v Jones*, 468 Mich 345, 355 (2003).

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